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ABSTRACT

This paper reports on the strategies used by an English-as-a-Second-Language (ESL) teacher to help law students whose first language is Chinese in an English-for-law course learn and understand how to negotiate legal texts and ordinances and connect them with the concerns of people in the real world. The example of the recently enacted Human Organ Transplant Ordinance in Hong Kong is used to show how legal rhetorical objectives can be realized through a series of forensic tasks that connect with the real world concerns of both medical professionals and the lay relatives of transplant recipients. Underlying the paper is a philosophy of ESL teaching that prizes the interdependence of language and content, and the need to raise students' language awareness to maintain clear relevance to their legal studies--an approach aimed at sustaining student interest while raising their awareness of why ordinances are structured the way they are. Real-world case studies are used rather than textbook grammar exercises in order to weave the linguistic agenda into authentic contexts and purposes. Six appendices are included: "Legal Reasoning Moves in an Ordinance-Legislative 'Actions'"; "Circumstances, Conditions, and Exceptions--Hedging the Legal Action"; "First Four Sections of the Human Organ Transplant Ordinance"; an article from the English language Hong Kong press "Medical Bureaucracy Blamed for Fatal Delays, Pre-Transplant Deaths Anger Doctor"; "Two Routes to Amending the Human Organ Transplant Ordinance"; and "LegCo Subcommittee on Human Organ Transplant Ordinance, Extract from the Minutes of the Meeting of 8 Jan. 1999." (KFT)

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TESOL 2000 Convention: March , 2000

Connecting legal discourse with real world concerns

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ED 444 384

Abstract

The language of legal ordinances can seem extremely turgid to the lay reader, whose interests very often they are designed to protect. The longer they have been on the books, the more they are likely to be subject to amendment, the legal propositions hedged by circumstantial provisos and layers of qualification. This mushrooming of statutes is primarily the result of the attempts of legal drafters to respond to previously unforeseen circumstances or events, often raised in the courts. The historic use of such heavily-modified propositions has resulted in legislation which advocates of the Plain Legal English movement hold to be detrimental to the public interest. They are certainly very difficult for ESL law students to penetrate, and even more difficult for the EAP teacher to bring to life in the classroom.

In this paper I report on strategies used on an English for Law course to teach students to negotiate Ordinances in ways that connect these seemingly obscurely-worded texts with the concerns of people in the real world, both legal and lay. The recent and therefore relatively concise Human Organ Transplant Ordinance (HK) is used to show how legal rhetorical objectives can be realised via a series of forensic tasks that connect with the real-world concerns of both medical professionals and the relations of transplant recipients.

* * *

I. Background: From Law to Language - and back

Underlying this paper is a philosophy of EAP teaching that prizes the interdependence of language and content, and the need, in trying to raise students' language awareness, to maintain clear relevance to their legal studies. This has been driven home to me by my involvement with our English for Law program at HKU.

I'll start with a brief overview of some features of the Law discipline, and some implications for teachers of English for legal communication:

1. **Nature**: HK law is modeled on UK law - a combination of **statutory** and **case** (**common**) **law**, based on judicial decisions made on the specific facts of each case - or most analogous precedent case. The discipline lends itself to teaching by **induction**, asking students to induce legal issues and principles from the set of events underpinning the plaintiff's cause of action against the defendant.
2. **Legal Reasoning**: the law has well developed reasoning routines, based on analogy and complex categorisation as to actionability. The facts of a case either fit a category of law, or are analogous to another set of facts which have already been categorised as disclosing a particular cause of action (e.g. imposing a duty of care).
3. **Genres**: Case/Common vs Statutory law: *Case Reports* vs *Ordinances* (HK)
   Case law *"fills the gaps permitted to remain by legislative inactivity" (Wesley-Smith, 1987).*
   Ordinances are highly categorial and exhaustive by nature, and tend to feature a more restrictive set of rhetorical moves: injunctions, guidelines and means of redress and punishment for all kinds of social and professional behaviour (see Appendix 1).

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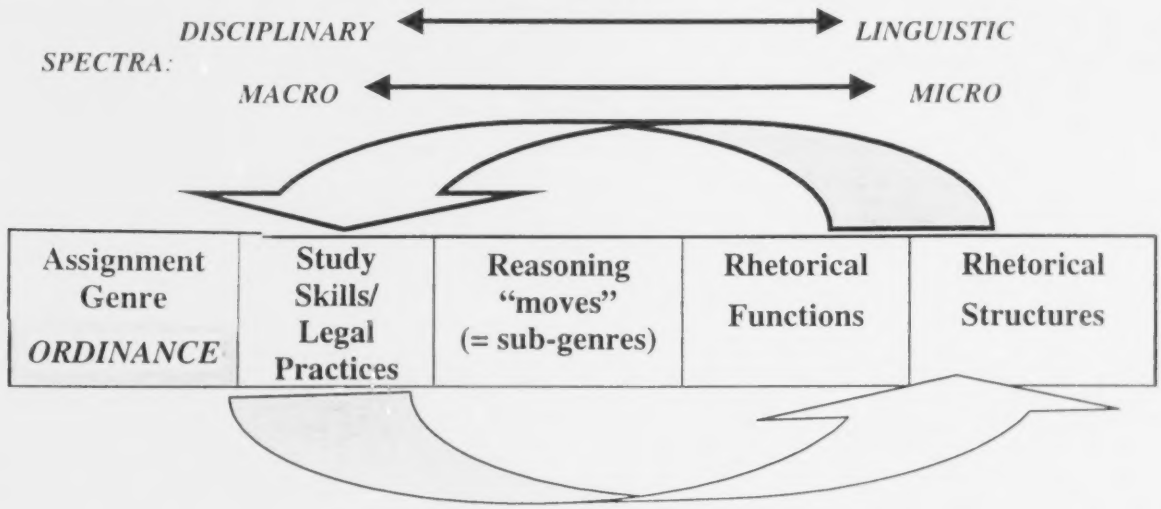
4. **Change**: The **law** is constantly **changing** - new decisions and unprecedented circumstances force the judiciary and legislature to respond. The more major changes are assimilated into the curriculum, as the law **teachers update** their material. They are helped in this enterprise by almost annual editions of core textbooks in their subjects.
5. **Teaching Approaches**: The law has long been taught in a combination of didactic and **problem-based** approaches. Setting challenges to students to induce the appropriate issues and principles that apply to problem facts makes for a stimulating and intellectually demanding curriculum.
6. **Language:** this is crucial to the interpretation and to the application and prosecution of the law. But while law teachers are sensitive to language, they tend not to address it directly. Rhetorical and organisational formulae are left to be learned from a didactic set of guidelines, from the many textbooks on legal and legislative drafting, or more normally through sustained exposure to and grappling with substantive law.
7. **EAP for Law Approaches:** Need to start with an understanding of the above, and ensure
   a) that these factors inform your syllabus design, &
   b) that students are constantly aware of the interdependency of language and law.

II. Genre-based and Problem-based Approach

The students want to improve their ability to handle the Tort syllabus. They see our job as helping them to do that. This accounts for the focus on assignment genres - either reading for meaning and understanding, or writing to display argumentative ability and substantive knowledge (knowing the law). Our approach to teaching them EAP for Law has thus required us to:

1) learn enough about the legal subject matter in the generic text being used
2) seek out the salient and problematic discourse features in that genre;
3) re-focus the materials to respond to the level at which a law student is going to engage with the materials.

The following diagram attempts to show how we as EAP teachers play the language-content spectrum. We start from, and then ultimately return to, the students' home ground, rather than attempting to draw them inexorably towards a study of legal rhetoric and useful language structures.



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In this paper I address one particular legal genre: the **Ordinance**. I should first put this in the context of our course. We tackle 3 key genres: the **Case Report**, the **Ordinance** and **the Problem Question Answer**, in that order, and for all of these we shadow the Negligence "core" of the Tort course. The problems that Ordinances present students are special, largely because of the sheer explicitness required of a set of statutory rules of conduct. For an EAP audience, rather than attempt to explain what an Ordinance looks like, let's just look at an example (Appendix 5).

A side issue here, but covering even that area of law places huge demands on the EAP teacher - not so much to be able award marks for compliance with the task, but to have enough background knowledge to *deny* credit for reason of *non*-compliance. I.e. it's one thing to work from a model answer - another to be able to argue why a student's point was rejected as inappropriate. This experience has further reinforced my belief in specialisation within tertiary EAP organisations among their staff. The management of such issues is the stuff of another paper, but the point here is that good EAP requires considerable commitment of the English teacher to learning about both the discourses and the subject matter of the students being taught, in designing the appropriate curriculum to teach the target communication skills

A. Teaching students how to navigate Ordinances

The discourse and the genre: what's there to learn

We're still wrestling with the problem of how to introduce students to the very different discourse style of Ordinances.

SPECTRA:

DISCIPLINARY ⟷ *LINGUISTIC*

MACRO ⟷ *MICRO*

Assignment Genre	Study Skills/ Legal Practices	Reasoning "moves" (= sub-genres)	Rhetorical Functions	Rhetorical Structures
Ordinance	**Reading statutes** Reading complex legal writing; locating key information	**Course of action** or **obligation** given certain **conditions**, **provisions** or **circumstances** + **Definition of terms**	Causation Condition/ Exception Obligation	Where X has resulted from Y Provided that… Except where… An X shall not be entitled to Y X shall be liable to pay for Y

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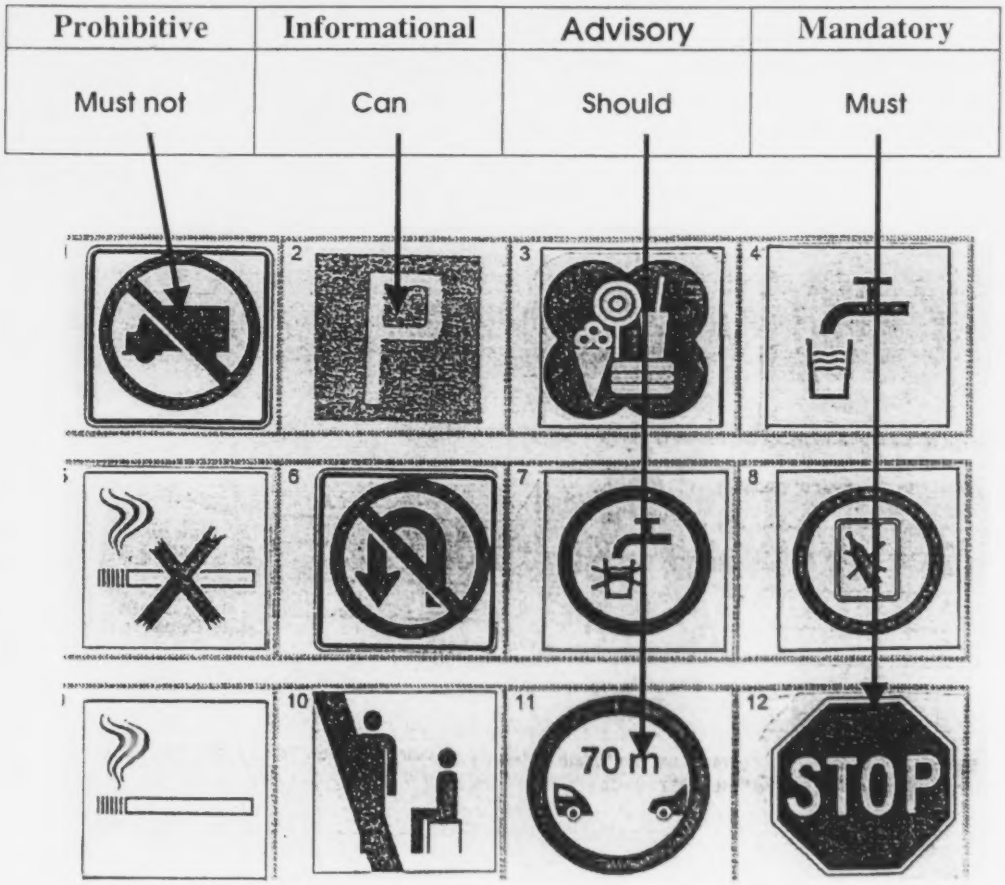
Connecting the functions of an Ordinance with everyday life - and signs

The English for Law course's first coordinator, Robin Corcos, in developing the materials for this module, went "back to basics" in looking at the regulatory language and mechanisms that abound in everyday life, making the connection with the real world. After an opening inductive problem, we ask students to consider the following set of signs, and place each in one of (at least) **four** categories, according to its intended effect.



Legal Reasoning moves - Legislative "actions"

Students need to be able to make the connection between the organisation and discourse structure of ordinances and their general *legal functions*. We start by looking at the macro-organisation of the genre. Appendix 1 shows the most common legal functions or "actions" that generally feature across the span of an Ordinance. At this point, after a brief mapping of these functions against the everyday sign functions, we prefer to have students explore the Ordinance, to discover some of these language patterns and to match these with their functions. The *Contents* pages of larger Ordinances, like the *Employees Compensation Ordinance*, also offer useful overviews of how Ordinances tend to be constructed - how they have their own logical development. But it is at the

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level of the section and sub-section that we need to focus to study the very dense writing style used by the legislative drafter.

Appendix 2 offers students a similar task to the "legal action": task: search through a section (5 of the ECO) for the various moves identified in the table: legal action, circumstance, condition, exception, etc. For the purposes of this paper, though, I take the example of a much shorter ordinance, which also has the important quality of raising issues of power and decision-making in a controversial area of medical law: the Human Transplant Ordinance.

B. Connecting Ordinances to the "real world"

Making the learning of the language and structure of Ordinances interesting, challenging and relevant to the students has not proved easy. In our course we have made use of the recent and therefore relatively concise ***Human Organ Transplant Ordinance (HK)*** to show how legislation is dynamic and evolving, responding to new circumstances and interpretations. The material we have developed begins by asking the students to reflect on the purpose of Ordinances - with an emphasis on "action" verbs. The students come pretty close to the kinds of concepts we introduced earlier - prohibitive, mandatory - but with greater responsibility to control behaviour. With a little guidance, the students came up with the concepts which dominate the opening rationale of the Human Organ Transplant Ordinance.

> *To* **prohibit** *commercial dealings in human organs intended for transplanting, to* **restrict** *the transplanting of human organs between persons who are not genetically related, to* **regulate** *the importing of human organs intended for transplanting and for supplementary purposes connected with those matters.*[see Appendix 3]

From that point we switch straight to an inductive, discovery-based approach, offering the students 2 newspaper articles (handout App.1) and an Ordinance, and asking them to assume a particular **role**: as a new trainee draftsman with the Justice Dept, and undertake an urgent task - to draft an amendment to the Human Organ Transplant Ordinance for presenting to Legco. Specifically they are given a reading and then a writing task:

1. ***Read*** through these 2 articles (Appendix 4), and then the Ordinance, identifying where the problems have arisen for the parties in the articles.
2. ***Draft*** the necessary amendment(s)

The writing task is not meant to aim at mastery. After they have drafted something, they are then offered 2 contrasting versions of an amendment, and are asked to detect a fundamental difference between the 2 (Appendix 5 - ***can <u>you</u> see the difference ?-*** check the bolded text). To help them spot the key issues, there are also extracts from an *Association of Parents of Handicapped Children*, a UK case on refusing treatment, and extracts from Minutes of *Bills Committee* meetings - one which features a debate over the role of next of kin in authorising transplants, and the other criticising the first amendment proposed. One of the culminating tasks is in fact to ask the students to edit the first draft amendment in response to the Bills Committee's criticisms.

The idea, then, is to produce a series of forensic tasks that connect the forbiddingly formal legislation with the people in the real world the legislation is meant to protect and regulate. The first question we use asks students to say what legislation is "for". The Human Organ Transplant Ord. Is an interesting one as it's topical, has a gory aspect to it, and involves a tension between the interests

of a professional body and the public - i.e. between medical professionals and the close relations of transplant recipients.

With this Ordinance, the students are offered a range of inputs to help them identify the authentic problems encountered by the family of a transplant patient, the issues and problems with the legislative drafting that need to be addressed, and how the final changes were eventually arrived at. Readers are invited to look through Appendices 4, 5, & 6 to determine how the legislative amendment should turn out. The kind of input which brings the tasks closer to home are the following letter (extracted) from concerned parents of handicapped children, via their Association:

Letter to the Bills Committee on Human Organ Transplant (Amendment) Bill 1999
From the Parents' Association of Pre-School Handicapped Children

18 January 1999

Members, Bills Committee on Human Organ Transplant (Amendment) Bill 1999

Dear Sirs,

Regarding the Human Organ Transplant (Amendment) Bill 1999, various parents' associations of mentally handicapped persons have the following views:

.....

2) The exemptions to Section 5(4) (c)* as proposed in the Bill is applicable to children (minors) as well as mentally handicapped persons. According to the existing law, parents, being the legal guardians of their children, have the right to sign on their behalf for consent to undergo an operation. **Do the amendments proposed in the bill imply that parents no longer have the right to consent to transplant operations ion behalf of their children (including mentally handicapped children)?**

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* *[relevant extract from H.O.T. Ordinance]*

5 (4) (c) a registered medical practitioner, who is not the medical practitioner who will remove the organ from the donor or transplant the donor's organ into another person, has explained to the donor and the recipient, and each has understood-

(i) the procedure;
(ii) the risk involved; and
(iii) his entitlement to withdraw consent at any time;

A further clue is offered in supplementary reading from a relevant UK case report: Re T (Adult Refusal of Medical Treatment) [1992] 4 All ER 649:

"If.. the patient ...is in no position to make (a choice), e.g. the classic emergency situation with an unconscious patient, the practitioner can lawfully treat the patient in accordance with his clinical judgment of what is in the patient's best interest. There seems to be a view in the medical profession that in such emergency circumstances the next of kin should be asked to consent on behalf of the patient and that, if possible, treatment should be postponed until that consent has been obtained. This is a misconception because the next of kin has no legal right either to consent or to refuse consent"

To cut a long story short, **in this case the key difference was that the Bills Committee followed UK procedure and ignored the rights of closest living relatives, arrogating the decision-making prerogative to the medical profession (doctors not directly involved in the transplantation).**

Conclusion

This paper has attempted to place the Ordinance in the context of legal genres, and an English for Law course for 1st-year ESL-medium University Law students. The outcomes we have aimed at with this approach have been simply to sustain students' interest while we raise their awareness of why Ordinances are structured and written as they are. By using real-world case studies rather than text grammar exercises, we feel we have gone some way to fulfilling one of the tenets of good EAP practice - weave your linguistic agenda into authentic disciplinary contexts and purposes, preferably genre-based and project-based. The Ordinance is not the most riveting of legal genre for students, and that made the challenge more interesting.

We chose to direct the students toward this genre via confronting the social implications and repercussions of the shortcomings of an Ordinance. In this case the drafters had overlooked problems associated with recipients of organs for transplantation, and the handling of consent in cases of mentally incapacitated patients. The students were offered the chance, in an inductive, discovery-oriented manner, to make good those shortcomings, then to compare and select from two alternatives, and then to consider how the final version was arrived at. By that time, they should have gained valuable insights into how Ordinances are drafted, but also how difficult they are to write well.

Acknowledgements

I should like to thank my colleagues on the English for Law team at the English Centre, HKU for mutual support over the past three years. I am particularly indebted to Robin Corcos, who has been most responsible for giving the course its creative impetus and its solid grounding in the law of tort. Nearly all the materials referred to here were originally developed by him.

Appendix 1: Legal Reasoning moves in an Ordinance - Legislative "actions"

CATEGORIES	NON-LEGAL EXPRESSION	EXAMPLE & Request for ECO example
1. Define area where rules apply (Basic rule, with conditions)	`These rules **apply** in this situation.'	`This section **applies to** any offence which fulfils one or more of the following conditions.' [s.31 (1) Public Order Act 1986]; or: "A person **is guilty** of an offence **if** he (buys an organ from a dead person for transplantation)". [s.4(1) Human Organ Transplant Ord.]
2. Explain what words mean.	`In these rules, this word **means** `X''.	"permanent identity card" **means** an identity card which contains a statement that the holder has the right of abode in H.K. *[s.1A ROP]*
3. Establish an administrative body.	`This organization now **exists**.'	`**There shall be** a Commissioner of Registration....' *[s.2(1) ROP]*
4. Impose duties	`Your job/duty is to do X '	`The Governor **shall appoint** a chief adjudicator'. [s.3C(2) ROP*]
5. Impose/exempt from obligations (or give right to do so).	`You **must** do X - if you don't there will be penal consequences.'	`Every person in Hong Kong **is required to be registered** under this Ordinance...' *[s.3(1) ROP]*
6. Give rights.	*[can, may]* `You **are allowed** to do X.'	`A person...**may...apply for** a permanent identity card to be issued to him...' [s.3(A) ROP]
7. Restrict rights.	`Normally you are **allowed** to do X, but **not** in this case.'	`the service of a ... notice of appeal... **does not give any right to** remain in Hong Kong pending the decision of the Tribunal.' *[s.3D (7) ROP]*
8. Prohibit actions.	You are **not allowed** to do X.'	`Any person who ... has in his custody... a forged identity card...**commits an offence**.' [s.7A(1) ROP *(see also 1. above)*
9.State penalties.	`This is the legal **consequence** of [not] doing that.'	`Any person who fails to comply with subsection (1).. **is liable to** a fine of $5000...' *[s5(2) ROP]*

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Appendix 2: Circumstances, conditions and exceptions - hedging the legal action

Students are asked to look at the following table of a section's functional composition and map in onto Section 5 of the *Employees Compensation Ordinance (HK)*. Key rhetorical patterns in **bold**.

Sub-section	LEGAL [RHETORICAL] FUNCTION	EXAMPLES
(1)	Statement of the **conditions** or **circumstances** under/in which the section applies or its general subject matter. - ***or*** which are overridden by this (sub-) section	**Subject to** subsections (2) and (3), [plus the "if "conditions *(see 2.)*, which are inseparable from the rule itself] or : **Notwithstanding** anything in section 16A, the court may cancel a certificate of injury if.... [s.16B, ECO]
(2)	The **basic rule** laid down by the section.	**If** ...personal injury is caused to an employee, his employer **shall be liable** to pay compensation...
(3)	First **exception** to the basic rule.	(2) **No** compensation **shall be payable** in respect of - (a) any injury, *other than (X) (see (4)*, **which does not** incapacitate the employee from earning full wages...deliberate self injury...
(4)	A **restriction** on the scope of the **first** exception.	... **other than** an injury which results in partial incapacity of a permanent nature, ...
(5)	Second/further **exception** to the basic rule.	(3) In any proceedings under this Ordinance were it is proved that the injury to an employee is attributable to the serious and willful misconduct of that employee, or ...., any compensation in respect of that injury **shall be disallowed**; *except.....(see (6))*
(6)	A **restriction** on the scope of the **second**/further exception.	(3) ...**except that** where the injury results in death or serious capacity
(7)	**Definitions** of terms used/**Admissibility** of circumstances (e.g. of accident).	(4)For the purposes of this Ordinance— (a) an accident arising in the course of an employee's employment **shall be deemed**, in the absence of evidence to the contrary, also to have arisen out of that employment

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Appendix 3: 1st 4 sections of the Human Organ Transplant Ordinance
Contact: njbruce@hku.hk
Connecting legal discourse to the real world / TESOL 2000 / 15-3-2000

CHAPTER 465

HUMAN ORGAN TRANSPLANT

An Ordinance to prohibit commercial dealings in human organs intended for transplanting, to restrict the transplanting of human organs between persons who are not genetically related, to regulate the importing of human organs intended for transplanting and for supplementary purposes connected with those matters.

[section 3 : 15 February 1996] *L.N. 77 of 1996*

1. Short title and commencement

(1) This Ordinance may be cited as the Human Organ Transplant Ordinance.

(2) This Ordinance shall come into operation on a day to be appointed by the Governor by notice in the Gazette.

2. Interpretation

In this Ordinance, unless the context otherwise requires—

"board" (委員會) means the Human Organ Transplant Board established by section 3;

"organ" (器官) means any part of the human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be regenerated by the body, and includes part of an organ;

"payment" (付款) means payment in money or money's worth but does not include any payment for defraying or reimbursing—

(*a*) the cost of removing, transporting or preserving the organ to be supplied; or

(*b*) any expenses or loss of earnings incurred by a person and attributable to his supplying an organ from his body.

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3. Establishment of Human Organ Transplant Board

(1) There is established a board to be known as the Human Organ Transplant Board.

(2) The board shall consist of 9 persons appointed by the Secretary for Health and Welfare as follows—

(*a*) a chairman who shall not be a registered medical practitioner;

(*b*) 4 members who shall be registered medical practitioners;

(*c*) 1 member who shall be a social worker;

(*d*) 1 member who shall be legally qualified;

(*e*) 2 other members.

(3) The chairman and members of the board shall be appointed on such terms and for such period as the Secretary for Health and Welfare shall specify on appointing them.

(4) The procedure of the board shall be such as the board may determine.

4. Prohibition of commercial dealings in human organs

(1) A person is guilty of an offence if, in Hong Kong, he—

(*a*) makes or receives any payment for the supply of, or for an offer to supply;

(*b*) seeks to find a person willing to supply for payment, or offers to supply for payment; or

(*c*) initiates or negotiates any arrangement involving the making of a payment for the supply of, or for an offer to supply,

an organ which has been or is to be removed from a dead or living person, whether in Hong Kong or elsewhere, and is intended to be transplanted into another person, whether in Hong Kong or elsewhere.

(2) A person is guilty of an offence if he takes part in the management or control of a body of persons corporate or unincorporate whose activities consist of or include the initiation or negotiation of any arrangements referred to in subsection (1)(*c*).

(3) Without prejudice to subsection (1)(*b*), a person is guilty of an offence if he causes to be published or distributed, or knowingly publishes or distributes an advertisement—

(*a*) inviting persons to supply for payment an organ which has been or is to be removed from a dead or living person, whether in Hong Kong or elsewhere, and is intended to be transplanted into another person, whether in Hong Kong or elsewhere, or offering to supply any such organ for payment; or

(*b*) indicating that the advertiser is willing to initiate or negotiate an arrangement referred to in subsection (1)(*c*).

Appendix 4: HONG KONG STANDARD SATURDAY 14 NOVEMBER

Medical bureaucracy blamed for fatal delays

Pre-transplant deaths anger doctor

By Sanna So

Dr Lo Chung-mau, physician of terminal liver patients Chow Yarn-fan and Fung Kwok-lung, has finally revealed how he tried to get the green light to do a transplant on his patients from the Human Organ Transplant Board - all to no avail.

Both patients died and he told his audience in the popular radio talk show *Teacup in the Storm* he regretted he could do nothing to save their lives.

Breaking his silence, Dr Lo focused on his vain struggle to save the life of Chow, who had a donor - his nephew - standing by for the go-ahead from the board, as required by law.

He said Chow was admitted to Princess Margaret Hospital last month for acute hepatitis B infection.

He was later transferred to Queen Mary Hospital for a liver transplant.

At 11 pm on 17 October, his nephew who had offered part of his liver for the transplant arrived at the hospital from the mainland.

Half an hour after midnight, Dr Lo lodged the application for approval of the surgery after discussing it with the family and potential donor.

The patient was in a coma at that time.

He faxed the board's secretariat documents related to the case and called again at 2.30 am for an answer.

Not until 11.30 am on 18 October was the doctor informed that the application was rejected because the patient had not been given an explanation about the risks involved in surgery and no consent obtained as required by law, the doctor said.

The patient died at 7.10 am, 21 October.

A Mrs Leung who claimed to be a relative of Mr Chow, said the family could not reach the members and they were not asked to submit supporting document or proof for the application.

Disappointed, Dr Lo said: `As a doctor, I always want to save patients especially those in critical condition. One in 10 patients like Mr Chow die without (an organ) transplant.

He said less than 10 per cent of terminal liver patients managed to receive a new liver from a deceased body, and about 30 per cent from family members.

`The successful rate of acute liver transplant between living persons at QMH is as high as 88 per cent. I could say that we have the highest success rate of this type in the world,' the doctor said.

In the application process, the doctor was not able to contact the members or chairman of the board, but had to go through the secretariat.

Mrs Leung said the family overheard the conversation between Dr Lo and the secretariat.

`Dr Lo was angry ... it seems that the secretariat was asking why it was so late,' she said, adding that the secretariat did not understand the urgency of the case.

In the case of Fung, the patient died before any offer was made. At least four potential living donors, including an inmate of Stanley Prison, had made enquiries but no firm commitment was made.

Your role: You have just been appointed as trainee draftsman with the Justice Dept. Your first assignment is an urgent one - to draft an amendment to the Human Organ Transplant Ordinance for presenting to Legco.
The reasons for the need for amendment are revealed in these 2 newspaper articles.

Tasks:
1. ***Read*** through these 2 articles, and then the Ordinance, identifying where the problems have arisen for the parties in the articles.
2. ***Draft*** the necessary amendment(s)

South China Morning Post Saturday November 7 1998

Liver man dies as organ row intensifies

Cynthia WAN and RHONDA LAM WAN

Liver patient Fung Kwok Leung died yesterday without the transplant that might have saved him, but the outcry over his case has sparked a review of organ donation laws.

Legislator and chairman of the Human Organ Transplant Board Sophie Leung Lau Yau-fun pledged to study the legislation, taking into account recent public criticism.

Her opinions will be submitted to the Government.

Fung, 41, died in Queen Mary Hospital yesterday afternoon, 10 days after his wife and eight-year-old daughter made impassioned appeals for a liver donor.

The family received a number of inquiries, including one from a prisoner who said he had a compatible blood type and was prepared to donate part of his liver.

But the organ donation law demands that the patient as well as the donor sign forms - impossible because Fung was in a coma. There is no provision for a relative to sign on the patient's behalf.

The transplant board also has to approve any application for transplant from a live donor. The ordinance was enacted in April to prevent possible organ trading.

But board members have been criticised for not being able to vet an application as soon as it is received in life-and-death cases.

Another liver patient had died after the board rejected a donation offer by his nephew because the unconscious patient could not sign the agreement himself, his family members claimed.

The Democratic Party said last night the ordinance should be reviewed in light of the problems. Michael Ho Mun-ka, who chairs the Legislative Council health services panel, said he would raise the issue.

Fung's widow, Fung Ching Lai-sheung, praised those who offered parts of their liver to save her husband. `It's a shame there are so many people willing to donate parts of their liver to my husband, but no relatives of people came forward.'

Her daughter, who was being cared for by her grandfather, did not yet know about her father's death.

Mrs Fung, a clerk, pledged to work hard to fulfil her husband's dream of seeing his daughter enter university.

Mr Fung's physician, Dr Lo Chung-mau of Queen Mary Hospital, said he had been prepared for the worst because only one in 10 patients got a suitable liver through public appeals.

1. In which sub-section?

2. In which sub-section?

3. Is the donee's signature required in the case of ALL donors who are relatives?

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Appendix 5: 2 routes to amending the Human Organ Transplant Ordinance: Section 5 : use Appendix 7 to work out which was preferred: A or B

A. **5. Restrictions on transplants between persons not genetically related**

(6A) Notwithstanding anything in subsections 4(c), (5) and (6), where the recipient is suffering from impaired mental functioning to the extent that he is incapable of understanding the procedure and the risks involved, the board may give its approval under subsection (3) provided that -

(a) **the risks and the procedure have been explained to the recipient's –**

- **spouse;**
- **parent; or**
- **closest living relative,**

and such person has agreed in writing to accept the risks on behalf of the recipient; and

(b) **two medical practitioners other than those who are to perform the transplant have certified that the recipient lacks the mental capacity to understand the risks and the procedures.**

Provided that, if in the opinion of the recipient's medical practitioner the consent required of the persons mentioned in section (4A)(a) has been unreasonably withheld the board may grant a waiver of such consent upon application by the recipient's practitioner.

B. - In fact, this was the Final Amendment to H.O.T. Section 5 [enacted on 19 Feb. 1999]

(6A) Notwithstanding subsections (4)(c) and (5) (insofar as it relates to subsection (4)(c)) or, as the case may be, subsection (6) (insofar as it relates to subsection (4)(c)) in the case, but only in the case, of the recipient-

(a) the board may give its approval under subsection (3); or

(b) the person who will remove from a living person an organ intended to be transplanted into another person where the approval of the board is not required under subsection (3) may remove the organ, if the board or person, as the case may require, is satisfied that-

(i) **a registered medical practitioner, who is not the medical practitioner who will remove the organ from the donor or transplant the donor's organ into another person, has certified in** writing that the recipient is incapable of understanding the explanation as mentioned in subsection (4)(c) by reason of-

(A) his suffering any illness;

(B) his being a minor;

(C) his being a mentally incapacitated person within the meaning of the Mental Health Ordinance (Cap 136); or

(D) his suffering an impaired state of consciousness;

(ii) **a registered medical practitioner**, who is not the medical practitioner who will remove the organ from the donor or transplant the donor's organ into another person**, has certified in writing that it would not be in the best interests of the recipient to wait until he is capable of understanding such an explanation**; and

(iii) the registered medical practitioner who is to transplant the organ into the recipient has kept a medical report in writing stating the reason why subsection (4)(c) cannot be complied with in respect of the recipient. (Added 7 of 1999 s. 2)

Appendix 6: LegCo Sub-Committee on Human Organ Transplant Ord.

Extract from **Minutes of meeting of 8 Jan. 1999** [pp. 10-11]

[Discussion of Estate Doctors' Association Ltd. (EDA)'s proposal] – salient points in **bold**

33. Referring to item 2 of the paper, the Chairman said that the EDA had proposed that in case a recipient was incapable of understanding, two independent registered medical practitioners who did not have any clinical responsibility for the recipient could act on behalf of the recipient to give consent to receiving an organ, provided that there was no objection from the family members of the recipient. He said that the EDA and the two deputations were **in favour of the recipient's family making a decision**. The Chairman considered that **involving a third party** in the decision process **would only complicate the matter**. Mr. LAW Chi-kwong said that it would become even more complicated if there were disputes among family members. The Chairman said that **if family members were allowed to give consent on behalf of the recipient**, clear definition of the next of kin should be provided.

34. DSHW (Dep. Sec. of Health & Welfare) said that while it was feasible to define the next of kin in law and to prioritise the relationship, some recipients might not have any close relatives to act on their behalf. He said that having listened to legal opinion and having regard to the objective of acting in the best interests of the patient**, it was decided that medical practitioners**, who had the professional knowledge about the condition of a **recipient should be the ones to make the certification** and submit the application to the Board when a recipient became unconscious, **rather than allowing the decision to rest with family members**. **Members supported the Administration's proposal**.

35. The Chairman said that the EDA had also proposed in item 3 of the paper that consent to the removal of an organ from a mentally incapacitated person (MIP) or consent to receive an organ by an MIP from the donor could only be obtained exclusively through the court and could not be given by the guardian of the MIP. In response to the Chairman, Mr. LAW Chi-kwong explained that **the proposal had taken into consideration the possibility that the guardian or parents might not be acting in the best interests of MIPs** in living related organ donations. He said that this was a complicated issue, which was similar to the issue raised earlier about allowing family members to give consent on someone's behalf. DSHW said that the Administration was aware of the problem of MIP donors and was studying the matter.

36. Addressing members' concerns, SALA (Senior Assistant Legal Adviser) explained that the degree of capacity required to consent to medical treatment in law was the capacity to understand in broad terms the nature and effect of the treatment proposed. If a MIP did not have the capacity to understand, only the guardian or parents could give consent to medical treatment. As far as organ donation was concerned, if a MIP had the required capacity to understand the organ transplant, he could give a valid consent. If he did not, neither the guardian nor parents could give a valid consent because removing an organ from a body might not be considered as medical treatment in law. In response to a question from the Chairman, SALA said that **section 5(4)(d) required that the donor per se give consent to the removal of an organ, and not the guardian or parents**"

41. ....Neither the court nor the next of kin could give consent to medical treatment on behalf of patients who were unable to give consent. Dr. LEONG Che-hung suggested that similar provision be included in the Amendment Bill to safeguard medical practitioners.
DSHW said that he would discuss with the law draftsman to see if this was necessary."
(- and was it ? - check the final amendment)